

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 70285/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	☒ YES / ☐ NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	☒ YES / ☐ NO.
(3) REVISED.	☐
7/8/15 DATE	 SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -08- 07
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

IBR FIRE PROTECTION CC t/a IBR FIRE

APPLICANT

and

THE MINISTER OF LABOUR

1ST RESPONDENT

SABS COMMERCIAL SOC LIMITED

2ND RESPONDENT

Coram: HUGHES J

JUDGMENT

Heard on: 10 February 2015

Delivered on: 07 August 2015

HUGHES J

1. I encountered this matter on the opposed roll. The applicant sought that the answering affidavit filed by the second respondent ("respondent") on 23 April 2014

be set aside. Further, that the matter proceed as unopposed and that the respondent pay for the costs of this application.

2. Briefly, the applicant sought to interdict the respondent from implementing an on-site verification checklist together with ancillary relief. The application papers were served on the respondent on 28 November 2013. The respondent filed and served its intention to defend on 5 December 2013. The matter was on the unopposed roll on 17 February 2014. The matter became opposed and was removed from the roll with cost to be cost in the application.

3. On 8 January 2014 the respondent sought the applicant to produce certain documents in terms of Rule 35(12) of the Uniform Rules of Court. The applicant served its reply thereto on the respondent on 29 January 2014. On 24 April 2014 the respondent served its answering affidavit dated 23 April 2014.

4. The respondent having failed to file its answering affidavit in terms of Rule 6(5) (d) (ii), within the prescribed time, and even within the extended time allowed by the applicant, the applicant on 8 May 2014 served upon the respondent a notice in terms of Rule 30.

5. The applicant contends that the respondent having failed to comply with Rule 6 should have sought leave and condonation to file its answering affidavit which was out of time.

6. On 10 June 2014, the applicant, served its notice of motion in the present application and a notice with the heading, "*Notice of Enrolment unopposed roll – Rule 30A 18 August 2014*". The respondent filed and served on 10 July 2014 its intention to oppose the applicant's application in terms of Rule 30A. On 1 August 2014 the respondent served its answering affidavit to the Rule 30A application.

7. On 13 August 2014 the applicant caused a notice headed, "*Notice of removal unopposed roll – Rule 30A 18 August 2014*", to be served on the respondent. This notice requested the removal of the matter set down on the unopposed roll for Monday 18 August 2014.

8. The matter was then eventually set down as an opposed motion and heard on 10 February 2015.

9. The applicant sought the answering affidavit of the respondent of 23 April 2014 be set aside. In doing so, the applicant caused a notice as is set out below to be served upon the respondent:

“

NOTICE IN TERMS OF RULE 30

KINDLY TAKE NOTICE THAT the Second Respondent has failed to comply with the provisions of Rule 6(5) (d) (ii) and has filed its Answering Affidavit beyond the time-limits allowed.

TAKE NOTICE FURTHER THAT the Second Respondent has not sought the consent of the Applicant for such late-filing, nor does it address the issue of condonation in the Answering Affidavit.

TAKE FURTHER NOTICE the Second Respondent's conduct constitutes an irregular step, and it is afforded 10 (ten) days to remove the cause of complaint.”

10. However, the applicant's notice of motion with the relevant founding affidavit attached thereto was headed “*FOUNDING AFFIDAVIT – RULE 30A*”. Further, the relief sought at paragraph 4 of the papers is as follows:

“4. *RELIEF SOUGHT*

4.1 *The applicant seeks the following relief: -*

4.1.1 *Setting aside the Answering Affidavit of the Respondent dated 23 April 2014 (and filed 24 April 2014);*

4.1.2 *Ordering that the matter proceed on an unopposed basis;*

4.1.3 *That the Respondent be ordered to pay the Costs of this Application;*

4.1.4 *Further and/or alternative relief.”*

11. The premise upon which the applicant sought the order above is set out in paragraph 5.2 and 5.3 which reads as follows:

“5.2 On 8 May 2014 the Applicant supplied a Notice in terms of Rule 30(2) (b), within the time-periods set out by the Rules of Court;

and

5.3 The Respondent has failed to cure the non-compliance and has not sought condonation for the later filing of such Affidavit.”

12. The applicant argues that it served a notice in terms of “Rule 30” which the respondent concedes it received. The respondent takes issue that it did not receive a notice in terms of Rule 30A. The applicant submits that it matters not if the notice was headed Rule 30A or Rule 30(2)(b), what is of importance is the request made therein, and the details of the steps complained of. Further, it is clear from the Rule 30 notice that the applicant’s complainant lies in the late filing by the respondent of its answering affidavit on 24 April 2014 in the absences of seeking condonation.

13. The applicant further argues that the defence raised by the respondent is technical in nature and that the respondent cannot argue that it was at a loss as to what to do because it is clearly set out in the Rule 30 notice.

14. The argument on behalf of the applicant is that Rule 30(2) makes provisions for a request or an opportunity to remove the compliant and makes provision for irregular steps having been taken. Whilst, Rule 30A on the other hand is a catch all for non-compliance with the Rules. In this case the applicant alleges that the respondent is guilty of non-compliance with the time limits set out in Rule 6(3).

15. However, in the applicant's heads of argument the applicant submits that the correct rule to be applied is in fact Rule 30A which deals with non-compliance with the rules rather than an irregular step. All that was necessary for the respondent to do was to file its condonation application for the late filing of its answering affidavit, which it failed to do. Instead it chooses to adopt an "*over-technical approach*". The applicant finally argues that it has made out a case for the relief sought and the answering affidavit to be struck out.

16. The respondent argues that on a reading of paragraphs 5.2 and 5.3 *supra*, of the applicant's founding affidavit, it is evident from the applicant's founding affidavit that an application in terms of Rule 30(2)(b) was sought to get the respondent to "*cure the non-compliance*". The respondent argued that this is further substantiated by the applicant's submission that a Rule 30(2)(b) notice was served upon the respondent within the time set out in that rule.

17. The respondent contends that the applicant has now recanted the case it made out in its founding papers, based on Rule 30 (2)(b) to now seek relief in terms of Rule 30A. This is borne out in the applicant's heads of argument. The respondent argues this cannot be done as the procedure adopted by the applicant falls within that required in terms of Rule 30, that is why the applicant delivered the Rule 30 (2) notice. The procedure required in terms of Rule 30A was not followed.

18. In any event the respondent argues that both Rule 30 (2) and Rule 30A are not the correct Rules to follow in the circumstances of this case. The applicant's complainant lies in the respondent failing to file its answering affidavit timeously in terms of Rule 6 (5) (d) (ii) and the remedy to deal with the non-compliance lies within Rule 6 (5) (f).

19. The respondent argues that the applicant is not entitled to relief sought when it has failed to use the mechanism at its disposal in Rule 6. This rule sets out how one deals with the non-compliance complained of. The respondent stressed that the applicant cannot place reliance on Rule 30A, as this rule caters for those rules which

do not have a built in specified mechanism to deal with transgressions within that rule.

20. The respondent submitted that the applicant has failed to mention the timeframe of grace provided by the applicant to the respondent to file its answering affidavit. The entire process engaged by the applicant was embarked upon after the respondent filed its answering affidavit and not before. Clearly, from the applicant's conduct and from its papers, no prejudice is alluded to or even mentioned. In the circumstances, the respondent seeks that the application be dismissed with cost as the application contemplated in terms of Rule 6(5)(f), that is applicable is not before the court. The time contemplated in terms of Rule 30 has come and gone and there was no notice given as contemplated in Rule 30A.

21. Rule 6(5)(f) reads as follows:

(f) Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph (d), is delivered within the period referred to in sub-paragraph (ii) of paragraph (d) the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application. Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of his replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph (e) and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice. If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the registrar shall forthwith be given by applicant or respondent, as the case may be, to the opposite party.

22. On my reading of Rule 6(5)(f) it is evident to me that if there is non-compliance with the filing of an answering affidavit, in terms of this rule, the plaintiff is at liberty to set the matter down on the unopposed roll. Let's turn to examine Rule 30A upon which the applicant seeks to rely.

The Rule reads as follows:

30A Non-compliance with rules

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.

[Rule 30A inserted by GN R881 of 26 June 1998.]

23. As the heading illustrates Rule 30A is a general rule to deal with non-compliance with rules. It therefore is applied if there is non-compliance with any of the rules of court. The question to be asked, can this rule, that is Rule 30A, be used if a rule has within it specified mechanisms set out to deal with non-compliance of that specific rule? The answer lies in the case below.

24. In **ABSA BANK LTD v THE FARM KLIPPAN 490 CC 2000 (2) SA 211 (W)** at 213H-I and 214H-215A EPSTEIN AJ stated the following:

“What is now clear is that Rule 30A is the procedure to use where a party wishes to compel compliance with a notice or request given in terms of those Rules which have no special remedy for failing to comply or respond thereto. But the question to be decided is whether Rule 30A, which is now a Rule which stands alone, overrides or supersedes those Rules which have a specific remedy for non-compliance...”

...The provisions of Rule 30A, on the one hand, and those Rules which provide a specific remedy for non-compliance, on the other, remain conflicting or contradictory. The result must be that the general yields to the special. If this general Rule, that is Rule 30A, derogated from the Rules which contain a specific remedy (which I will henceforth term 'the specific remedy Rules'), it would only serve to curtail and frustrate the expeditious completion of litigation. The effect would be to afford a party an extra ten Court days (in essence two weeks) to comply with the Rules or to respond to a notice or request. A further effect would be to exacerbate the already high cost of litigation.

Rule 30A has an important place in the Rules, in that, as I have stated, it provides a remedy where none exists elsewhere. However, it could not have been intended by the drafters of

Rule 30A to jettison the existing and effective remedies provided in the specific remedy Rules. If it was so intended, it would render such remedies nugatory. The remedies in the specific remedy Rules have always been effective and there is no reason to denude them of their efficacy."

That underlined is my emphasis.

25. I align myself with the sentiments expressed by Epstein AJ above.

26. Adv. Tsatsawane for the respondent, argued that in these circumstance, the applicant had the advantage of a specific mechanism at its disposal, that is Rule 6(5)(f), it should have utilized same, intend of going on a confused tangent applying Rule 30(2) and then opting to rely on Rule 30A.

27. It is trite that in cases of this nature I have a discretion when exercising my powers, in doing so I take cognisance of the fact that the applicant has not advised in its papers or in argument what, period of extension had been granted to the respondent. This would have been helpful to ascertain why the applicant saw it fit to pursued this current application some thirty days after the respondent filed its answering affidavit.

28. Adv. Tsatsawane argued that the applicant did not want to deal with the merits after it received the answering affidavit and that might be why the confusion in pursuing the Rule 30(2) and Rule 30A application arose. As things stand, in my view there is merit in his agreement.

29. In the circumstances as there is no indication that the respondent filed outside the period of extension and the fact that the applicant only proceeded with this application sometime after the respondent filed its answering affidavit, it is my view that as Rule 6(5) (f) was not initiated by the applicant the answering affidavit stands. The applicant is to file its replying affidavit to the respondent's answering affidavit.

30. The applicant seeks to strike out the respondent's answering affidavit and in doing so engaged in unnecessary litigation, swing from Rule 30(2) to Rule 30A, in an attempt to have the answering affidavit removed from the proceedings. No reason is

advanced for the indulgence granted to the respondent and thereafter perusing this application, after the respondents filled its answering affidavit.

31. Taking the factors mentioned above I make the following order:

30.1 The application is dismissed with costs.



W. Hughes
Judge of the High Court